United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
OF THE SECOND CIRCUIT

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NEVIN NAWHINNEY,

Plaintiff-Appellant,

-against- 75-2086

ROBERT J. HENDERSON, Superintendent,
PETER PREISER, Commissioner of
Corrections, and NORRIS, Lieutenant,

Defendants-Appellees.

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-appellant appeals from an order of the United States Court for the Northern District of New York (Foley, J.), dated February 26, 1975, dismissing the complaint for failure to state a claim upon which relief can be granted.

Questions Presented

1. Does this Court lack jurisdiction to hear this appeal since appellant's notice of appeal was untimely filed?

2. Does an inmate in punitive segregation have a constitutional right to attend communal services?

3. Was appellant's removal to segregation proper?

Facts and Prior Proceedings

Appellant is presently incarcerated in the Fishkill Correctional Facility, Beacon, New York, pursuant to a judgment of conviction, entered by the Supreme Court, New York County (Rothwax, J.), after a plea of guilty, of Sodomy in the second degree. He was sentenced on July 25, 1974, as a second felony offender, to a term of from two to four years.

Appellant commenced the action that is the subject of this appeal in a verified complaint filed with the United States District Court for the Northern District of New York on February 27, 1975. Summonses were not served on the defendants. Thus, no defendant ever responded to the complaint.

The Court dismissed the complaint on the grounds that confinement to segregation is constitutional and that the denial of the right to worship while confined to segregation does not constitute a denial of constitutional rights.

A judgment dismissing the complaint was filed on February 27, 1975.

A notice of appeal was filed on April 2, 1975.

POINT I

SINCE APPELLANT'S NOTICE OF APPEAL WAS UNTIMELY FILED THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL.

The docket sheet (Appendix, p. 3) demonstrates that the District Court's judgment was entered on February 27, 1975. The notice of appeal was filed on April 2, 1975. Even allowing appellant an extra three days pursuant to the Federal Rules of Appellate Procedure, Rule 26(c), because the Court's judgment was presumably mailed to appellant, the notice of appeal was filed 34 days after judgment was filed and therefore was untimely under FRAP, Rule 4(a).

The timely filing of a notice of appeal is jurisdictional. If it is not timely, this Court lacks jurisdiction to hear the appeal, and the appeal must be dismissed. Graddy v. Bonsal, 375 F. 2d 764 (2d Cir. 1967); Guido v. Ball, 367 F. 2d 883 (2d Cir. 1966).

POINT II

AN INMATE IN PUNITIVE SEGREGATION HAS NO CONSTITUTIONAL RIGHT TO ATTEND COMMUNAL RELIGIOUS SERVICES.

This Court recognized in Sostre v. McGinnis, 334 F. 2d 906 (2d Cir) cert den. 379 U.S. 892 (1964) that an inmate's right to practice his religion is not absolute. In Sostre, the Court stated (344 F. 2d at 908):

> "[T]he practice of any religion... is subject to strict supervision and extensive limitations in prison. The principal problem of prison administration is the maintenance of discipline. ... No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials." (emphasis in original)

In LaReau v. MacDougal, 473 F. 2d 974 (2d Cir. 1972), this Court held that segregated prisoners may be denied attendance at communal worship services where prison officials have made a reasoned judgment "that unruly prisoners should not be given the opportunity to instigate trouble with the general inmate population." 473 F. 2d at 979.

Inmates placed in punitive segregation are by definition unruly and instigators of trouble. That Auburn inmates in punitive segregation have been denied access to communal worship, while being provided permission to confer with a chaplain, at the inmate's request, overcomes this Court's passing comment in LaReau v. MacDougall, supra, 473 F. 2d at 979-80, note 9, that all prisoners in segregation in Connecticut cannot be prevented from attending church services. In New York, an inmate is not placed in punitive segregation unless he is unruly and undisciplined.

This Court in LaReau v. MacDougall, supra, cited, with approval, to United States ex rel. Cleggett v. Pate, 229 F. Supp. 818 (N.D.Ill., 1964) where the Court held that segregated prisoners have no right to attend church services meant for the general prison population.

The same rule has been upheld in United States ex rel. Jones v. Rundle, 453 F. 2d 147 (3d Cir. 1971), where the Court stated that a prisoner's right to practice religion may be reasonably restricted to facilitate the maintenance of proper discipline in the prison. Thus, visits by a chaplain satisfied Constitutional standards where an inmate in a maximum security cell was not allowed to attend communal services.

In Cooper v. Pate, 382 F. 2d 518 (7th Cir. 1967), the Court recognized that where an inmate's past misconduct demonstrated a probability that he would misuse the opportunity, he could be denied the right to attend communal religious services.

In Sharp v. Sigler, 408 F. 2d 966 (8th Cir. 1969), Judge, now Justice Blackmun, stated, with respect to religious services for segregated prisoners, (407 F. 2d at 971):

> "[T]he measure and comparison of security risks as between alternative procedures are matters appropriate for resolution by the prison authorities and are not to be determined by the inmate."

In denying segregated prisoners the right to attend religious services with the general prison population, the Court found that the contolling factors were the preservation of order and the protection of the rights of others.

An individual's religious freedom is necessarily curtailed in prison, although it cannot be denied without some reasonable basis. O'Malley v. Brierley, 477 F. 2d 875 (3d Cir.

1973); Barnett v. Rodgers, 410 F. 2d 995 (D.C. Cir., 1969). Questions of security and discipline, however, provide that reasonable basis for curtailment of an inmate's First Amendment Rights. Neal v. Georgia, 469 F. 2d 446 (5th Cir. 1972).

Preventing an inmate in punitive segregation, who would not be there but for his threat to the security of the institution and his need for discipline is a rational basis for denying him access to communal religious services. Such a denial does not rise to the level of a Constitutional deprivation where, as appellant alleged below, it consisted of disallowance of his attendance at services on two Sundays.

POINT III

APPELLANT'S REMOVAL TO PUNITIVE SEGREGATION WAS PROPER.

This Court has long recognized that there is no constitutional infirmity with the use of punitive segregation. Wright v. McMann, 460 F. 2d 126 (2d Cir.) cert den. 409 U.S. 886 (1972); Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971) cert. den. 404 U.S. 1049 and 405 U.S. 978 (1972).

In Wolff v. McDonnell, 418 U.S. 539 (1974) the Court indicated that its procedures were not to apply to those incidents that did not lead to loss of good time or solitary confinement. Appellant no where alleges that he was denied good time, and although he did, below, on occasion mention "solitary" confinement, on appeal he speaks essentially about punitive segregation. In fact, the New York State Department of Correctional Services does not employ "solitary" confinement. In any event, in his complaint and in his brief to this Court, appellant admits that he was entitled only to an adjustment committee hearing, which is used only for lesser forms of punishment. See 7 NYCRR Part 252.

Appellant's complaint alleged that he was denied written notice of the charges and the right to call witnesses. Yet it was not until United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir. January 24, 1975) that this Court held that written notice must be provided in Adjustment Committee hearings.

Then in Crooks v. Warne, 516 F. 2d 837 (2d Cir. May 22, 1975) this Court held that New York State's Adjustment Committee proceedings must provide not only written notice but also an opportunity to call witnesses to ensure procedural due process.

Therefore, when appellant was placed in segregation in November 1974, it was not clear that he had the rights to written notice and the opportunity to call witnesses, since Wolff apparently did not apply to lesser forms of punishment and Sostre, assuming arguendo that it applied, did not require those provisions.

Larkins and Crooks, as statements of new procedural rules, cannot be applied retroactively, Wolff v. McDonnell, supra, 418 U.S. at 573-74, even when prison officials are being sued for damages. Cox v. Cook, ____ U.S. ____, 43 L. Ed 2d 587 (1975).

Plaintiff's allegation of a denial of due process were thus properly dismissed.*

* Although not given an opportunity to answer the complaint below, defendants-appellees deny that appellant was not given a proper hearing and that he was punished for filing a suit against them.

Not only is appellant incorrect about why he was placed in segregation, but his complaint is so full of inconsistencies that the District Court's ignoring of it is understandable. Although appellant claims in one part of his complaint that he was placed in segregation because of his filing an action in State Court, throughout the rest of his papers he appears to be stating that he had no argument with the fact that he was placed in segregation but merely with the procedure by which he was placed there. Notwithstanding the fact that plaintiff's complaint must be construed liberally since it was drawn pro se, it cannot contain such internal consistencies as to make it unbelievable. Cf. Powell v. Jarvis, 460 F. 2d 551 (2d Cir. 1972).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIMRED IN ALL RESPECTS.

Dated: New York, New York
October 23, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
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SAMUEL A. HIRSHOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 23rd day of October, 1975, she served the annexed upon the following named person:

WILLIAM HELLERSTEIN, ESQ.
Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York
Ellen Winner, Esq., of Counsel

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Magdaline Sweeney

Sworn to before me this
23rd day of October, 1975

David L. Bins
Assistant Attorney General
of the State of New York